



Agricultural Marketing Service

7 CFR Part 946

[Doc. No. AMS-SC-20-0095; SC21-946-1 FR]

Irish Potatoes Grown in Washington; Termination of Marketing Order 946

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; termination of order.

SUMMARY: This final rule terminates the Federal marketing order regulating the handling of Irish potatoes grown in Washington, and the rules and regulations issued thereunder. The marketing order is administered locally by the State of Washington Potato Committee (Committee), which unanimously recommended its termination at a meeting held on June 11, 2020. This recommendation is based on the Committee's determination that the marketing order is no longer an effective marketing tool for the Washington potato industry and that termination best serves the current needs of the industry by eliminating the costs associated with its operation.

DATES: Effective March 2, 2022.

FOR FURTHER INFORMATION CONTACT: Gregory A. Breasher, Marketing Specialist, or Gary Olson, Regional Director, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2054 or Email: Gregory.Breasher@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, finalizes the termination of regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Order No. 946, as amended (7 CFR part 946), regulating the handling of potatoes grown in Washington. Part 946 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." This action is governed by § 608c(16)(A) of the Act. The Committee locally administers the Order and is comprised of producers and handlers operating within the production area.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

In addition, this final rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. Agricultural Marketing Service (AMS) has determined this final rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to a marketing order may file with USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule terminates the Order and the rules and regulations issued thereunder. The Order contains authority for the regulation of Irish potatoes grown in Washington. At a virtual meeting held on June 11, 2020, the Committee unanimously recommended termination of the Order.

Section 946.63(b) of the Order provides that USDA terminates or suspends any or all provisions of the Order when a finding is made that the Order does not tend to effectuate the declared policy of the Act. In addition, section 608c(16)(A) of the Act provides that USDA terminates or suspends the operation of any order whenever the order or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act. Additionally, USDA is required to notify Congress no later than 60 days before the date the Order would be terminated.

Marketing Order No. 946 has been in effect since 1949 and has provided the potato industry in Washington with authority for grade, size, quality, maturity, pack, and container regulations, as well as authority for mandatory product inspection. The Committee has met regularly to evaluate the current status of the Washington potato

industry and to consider recommendations for modification, suspension, or termination of the Order's regulatory requirements, which have been issued on a continuing basis. Committee meetings are open to the public and interested persons may express their views at these meetings. The USDA reviews Committee recommendations, including information provided by the Committee and from other available sources, and determines whether modification, suspension, or termination of the Order's regulatory requirements would tend to effectuate the declared policy of the Act.

Handling regulations requiring potatoes to be inspected and meet mandatory minimum grade, size, maturity, quality, pack, and container requirements were in effect for all types of potatoes until 2010. USDA temporarily suspended the handling regulations for Russet type potatoes for one year, effective July 24, 2010 (75 FR 43042), and subsequently extended that suspension indefinitely, effective July 1, 2011 (76 FR 27850). Further, USDA temporarily suspended the handling regulations for yellow fleshed and white type potatoes effective October 24, 2013 (78 FR 62967), also extending that suspension indefinitely, effective July 1, 2014 (79 FR 26109). Lastly, USDA indefinitely suspended the handling regulations for all red types of potatoes, effective February 15, 2014 (79 FR 8253). The cumulative effect of the various suspensions was the total suspension of handling regulations for all fresh potatoes under the Order after July 1, 2014. All of the suspensions listed above were enacted upon the Committee's recommendation.

Following these regulatory suspensions, the Committee continued to levy assessments in order to maintain its functionality. The Committee felt that it should continue to fund its full operational capability in order to collect handler reports, track industry data, and preserve the authority to regulate handling, should that become relevant to the industry again sometime in the future.

The Committee met on January 22 and June 11, 2020, to discuss the current marketing environment of the Washington potato industry and the status of the Order. The Committee determined that the suspension of the Order's handling regulations has not negatively impacted the industry and that there is no longer a need for the Order. In addition, the Committee concluded that the data collection and reporting functions of the Order are duplicative of the services provided to the industry by the Washington State Potato Commission and that termination of the Order will not materially impact the collection and dissemination of essential industry data.

At the meeting held via conference call on June 11, 2020, the Committee unanimously voted in favor of recommending that USDA terminate the Order. In addition, the Committee recommended the Order's reporting and assessment requirements - the only regulatory activities still in effect - be suspended while USDA processes termination of the Order. The recommendation to suspend all remaining Order activities was a separate regulatory action from this rule. A final rule suspending the Order's reporting and assessment requirements was published in the **Federal Register** February 24, 2021 (86 FR 11091).

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS has considered the economic impact of this final rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 26 handlers of Washington potatoes and approximately 250 potato producers in the production area subject to regulation by the Order.

Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$30,000,000, and small agricultural producers are defined as those having annual receipts of less than \$1,000,000.

According to USDA Market News, the average shipping point price for fresh Washington potatoes during the 2019 shipping season was approximately \$15.79 per hundredweight. The Committee reported that 2019-2020 marketing year fresh potato shipments were 9,687,170 hundredweight. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, most handlers had average annual receipts of less than \$30,000,000 ($\$15.79 \times 9,687,170$ hundredweight equals \$152,960,414, divided by 26 handlers equals \$5,883,093 per handler). Thus, AMS concludes that the majority of handlers would meet the SBA definition of a small business.

USDA National Agricultural Statistics Service reported an average producer price of \$8.20 per hundredweight for the 2019 crop. Given the number of Washington potato producers, and assuming a normal distribution, average annual producer revenue is below \$1,000,000 ($\$8.20 \times 9,687,170$ hundredweight equals \$79,434,794, divided by 250 producers equals \$317,739 per producer). Therefore, most producers of fresh Washington potatoes may be classified as small businesses under the SBA definition.

This rule terminates the Federal marketing order for Irish potatoes grown in Washington, and the rules and regulations issued thereunder. The Order contains authority to regulate the handling of Irish potatoes grown in Washington. The Committee determined that regulating the handling of potatoes under the Order is no longer an effective marketing tool for the Washington potato industry. Evidence from the past

several years of operating with suspended handling regulations showed that potatoes can be shipped from the production area in the absence of the Order's minimum requirements without a negative economic impact on the industry.

Secondly, the Committee determined that the data collection and reporting function of the Order is duplicative of the services provided to the industry by the Washington State Potato Commission. The termination of the Order will not materially impact the collection and dissemination of essential industry data to Washington state potato growers.

As such, the Committee concluded that the costs associated with the administration of the Order outweigh the benefits of continuing the Order. This conclusion is based on the Committee's analysis of the 6-year period of regulatory suspension and findings that termination is not expected to negatively impact the marketing of fresh Washington potatoes because this action reduces the costs to both handlers and producers. Therefore, in an action taken on June 11, 2020, the Committee unanimously recommended that USDA terminates the Order.

Section 946.63(b) of the Order provides that USDA terminates or suspends any or all provisions of the Order when a finding is made that the Order does not tend to effectuate the declared policy of the Act. Furthermore, § 608c(16)(A) of the Act provides that USDA shall terminate or suspend the operation of any order whenever the order or provision thereof obstructs or does not tend to effectuate the declared policy of the Act. An additional provision requires that Congress be notified no later than 60 days before the date the order would be terminated.

The Committee considered alternatives to this rule, including taking no action (which would keep the Order active but with the handling regulations suspended) and suspending all of the Order's remaining regulatory provisions but not terminating the

Order. The Committee determined that neither option was a viable long-term solution and subsequently recommended that the Order be terminated.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and contained in OMB No. 0581-0178 Vegetable and Specialty Crops. Termination of the Order, and the reporting requirements prescribed therein, will eliminate the reporting burden on Washington potato handlers. Handlers will no longer file forms with the Committee, which will reduce industry expenses and save an estimated 9.7 hours per handler per year. This rule will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The Committee's meetings are widely publicized throughout the Washington potato industry, and all interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the January 22 and June 11, 2020, meetings were public meetings, and all entities, both large and small, were able to express their views on these issues. Interested persons were invited to submit comments on a proposed rule, including the regulatory and information collection impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules->

regulations/moa/small-businesses. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A proposed rule inviting comments regarding termination of the Order was published in the **Federal Register** on September 7, 2021 (86 FR 49930). AMS distributed the proposed rule to State of Washington potato industry members. In addition, the rule was made available on the internet by AMS and the Office of the Federal Register. The proposed rule provided a 60-day comment period for the interested parties to comment, which ended on November 8, 2021. Two comments were received in support of the termination.

Based on the foregoing, and pursuant to § 608c(16)(A) of the Act and § 946.63 of the Order, it is hereby found that the Federal marketing Order 946 regulating the handling of Irish potatoes grown in Washington does not tend to effectuate the declared policy of the Act and is therefore terminated.

Following termination, trustees will be appointed to conclude and liquidate the Committee affairs and will continue in that capacity until discharged by USDA. Section 608c(16)(A) of the Act requires USDA to notify Congress 60 days in advance of termination of a Federal marketing order. USDA notified Congress on December 2, 2021.

List of Subjects in 7 CFR Part 946

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

PART 946 – [REMOVED]

For the reasons set forth in the preamble, and under the authority of 7 U.S.C 601-674, 7 CFR part 946 is removed.

Erin Morris,

*Associate Administrator,
Agricultural Marketing Service.*

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